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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 SOUTHERN DIVISION

13 INNOVATIVE SPORTS MANAGEMENT,
14 INC.,

15 Plaintiff,

16 vs.

17 RENZO MACCHIAVELLO, et al.,

18 Defendants.

19 Case No. 8:12-cv-01748-TJH-PLA

20 PLAINTIFF'S OPPOSITION TO
21 DEFENDANTS' MOTION FOR
22 JUDGMENT ON THE PLEADINGS;
23 MEMORANDUM OF POINTS AND
24 AUTHORITIES

25 Date: October 1, 2013

26 Time: 9:00 a.m.

27 Place: Courtroom 17

28 Judge: Honorable Terry J. Hatter, Jr.

17 TO THE HONORABLE COURT, THE DEFENDANTS AND TO THEIR ATTORNEYS OF

18 RECORD:

19 Plaintiff Innovative Sports Management, Inc. (hereinafter "Plaintiff"), by and through
20 counsel, hereby opposes the Motion for Judgment on the Pleadings filed by Renzo Macchiavello,
21 individually and d/b/a Renzo's Taste of Peru, and Macchiavello, LLC, an unknown business
22 entity d/b/a Renzo's Taste of Peru (hereinafter "Defendants") (Dkt. No. 14). For the reasons set
23 forth herein, Plaintiff respectfully requests that Defendants' Motion for Judgment on the
24 Pleadings (hereinafter "Defendant's Motion) be denied.

TABLE OF CONTENTS

1	PAGE(S)	
2	TABLE OF AUTHORITIES	ii
3	INTRODUCTION AND STATEMENT OF FACTS	2
4	LEGAL STANDARD.....	2
5	ARGUMENT	3
6		
7	I. A MOTION FOR JUDGMENT ON THE PLEADINGS TESTS THE PLEADINGS AND DEFENDANTS' MOTION IS DEPENDENT UPON INFORMATION OUTSIDE OF THE PLEADINGS.....	3
8	A. <u>A Facial Challenge To Standing Has Been Rejected</u>	4
9	B. <u>Defendants Did Not Preserve The Issue Of Standing In The Pleadings</u>	5
10	II. PLAINTIFF HAS CONSTITUTIONAL STANDING TO BRING ITS CLAIMS	6
11		
12	III. DEFENDANTS' OTHER STANDING ARGUMENTS FAIL AS THE EVIDENCED PRESENTED BY DEFENDANTS DOES NOT SUPPORT DEFENDANTS' POSITION.....	7
13		
14	A. <u>Defendants' Exclusive Licensee Argument Ignores The Actual Statutes At Issue And Plaintiff Satisfies The Statutory Requirements Of 47 U.S.C. §§ 605 And 553</u>	8
15	1. Plaintiff Was Granted the Right to Pursue Claims for Piracy.....	12
16		
17	IV. DEFENDANTS HAVE NO RIGHT TO CHALLENGE THE CONTRACT.....	14
18		
19	V. PLAINTIFF SHOULD BE GRANTED LEAVE TO AMEND ITS COMPLAINT.....	15
20		
21	CONCLUSION.....	16
22		
23		
24		
25		
26		
27		
28		

1
2 **TABLE OF AUTHORITES**
3

	PAGE(S)
CASES	
<u>Alatorre v. Wastequip Mfg. Co. LLC,</u> 2013 WL 796717 (E.D.Cal. March 4, 2013)	16
<u>Althin CD Medical, Inc. v. West Suburban Kidney Center, S.C.,</u> 874 F.Supp. 837 (N.D.Ill. 1994)	9
<u>Aschcroft v. Iqbal,</u> 556 U.S. 662 (2009).....	2
<u>AsymmetRx, Inc. v. Biocare Medical, LLC,</u> 582 F.3d 1314 (Fed. Cir. 2009).....	9
<u>Barnhart v. Sigmon Coal Co.,</u> 534 U.S. 438 (2002).....	11
<u>Bell Atlantic Corp. v. Twombly,</u> 550 U.S. 544 (2007).....	2
<u>Directv v. Budden,</u> 420 F.3d 521 (5th Cir. 2005)	10
<u>Directv v. Webb,</u> 545 F.3d 837 (2007).....	11
<u>Dworkin v. Hustler Magazine, Inc.,</u> 867 F.2d 1188 (9th Cir. 1989)	2
<u>Ecological Rights Foundation v. Pacific Lumber Co.,</u> 230 F.3d 1141 (9th Cir. 2000)	7
<u>Foman v. Davis,</u> 371 U.S. 178 (1962).....	16
<u>Fralin & Waldron, Inc. v. Henrico County, Va.,</u> 474 F.Supp. 1315 (E.D.Va. 1979)	7
<u>G & G Closed Circuit Events, LLC v. Nguyen,</u> 2010 WL 3749284 (N.D.Cal. Sept. 23, 2010)	5
<u>Gennett v. Smith,</u> 244 A.D.3 (N.Y.A.D. 3d Dept. 1935).....	14
<u>Gevara v. Hubbard,</u> 2010 WL 1233839 (M.D.N.C. March 23, 2010)	3
<u>Hal Roach Studios, Inc. v. Richard Feiner & Co.,</u> 896 F.2d 1542 (9th Cir. 1989)	3
<u>Hanrihan v. Parker,</u> 19 Misc.2d 467 (N.Y.Sup. 1959).....	14

1	<u>HyperQuest, Inc. v. N'Site Solutions, Inc.,</u> 632 F.3d 377 (7th Cir. 2011)	9
2	<u>In re Porter's Estate,</u> 142 N.Y.S. 2d 787.....	14
3		
4	<u>In re VeriSign, Inc.,</u> 2005 WL 88969 (N.D.Cal. Jan. 13, 2005)	7
5		
6	<u>Indep. Towers of Wash. v. Washington,</u> 350 F.3d 925 (9th Cir. 2003)	8
7		
8	<u>J & J Sports Productions, Inc. v. Baylor,</u> Case No. 5:13-cv-02483-JS (E.D.Pa. July 25, 2013).....	15
9		
10	<u>J & J Sports Productions, Inc. v. Delgado,</u> 2012 WL 371630 (E.D.Cal. Feb. 3, 2012).....	10
11		
12	<u>J & J Sports Productions, Inc. v. Kurz, Ltd.,</u> 2009 WL 1886124 (E.D.Pa. June 30, 2009)	15
13		
14	<u>J & J Sports Productions, Inc. v. Mandell Family Ventures, LLC,</u> 2012 WL 4757694 (N.D.Tex. Oct. 5, 2012)	10
15		
16	<u>J & J Sports Productions, Inc. v. Marcaida,</u> 2011 WL 2149923 (N.D.Cal. May 31, 2011)	12
17		
18	<u>J & J Sports Productions, Inc. v. Mendoza-Gowan,</u> 2011 WL 1544886 (N.D.Cal. April 25, 2011).....	4
19		
20	<u>J & J Sports Productions, Inc. v. Montanez,</u> 2010 WL 5279907 (E.D.Cal. Dec. 13, 2010)	4
21		
22	<u>J & J Sports Productions, Inc. v. Rezdndiz,</u> 2008 WL 5211288 (N.D.Ill. Dec. 9, 2008)	10
23		
24	<u>JMP Securities LLP v. Altair Nanotechnologies Inc.,</u> 2012 WL 892157 (N.D.Cal. March 14, 2012)	2
25		
26	<u>Lujan v. Defenders of Wildlife,</u> 504 U.S. 555 (1992).....	6
27		
28	<u>Matranga v. Boyett Portable Restrooms, Inc.,</u> 2011 WL 7045237 (S.D.Ala. Sept. 22, 2011).....	3
23	<u>Nafal v. Carter,</u> 540 F.Supp.2d 1128 (C.D.Cal. 2007)	9
24		
25	<u>Pfizer, Inc. v. Elan Pharmaceutical Research Corp.,</u> 812 F.Supp. 1352 (D.Del. 1993).....	9
26		
27	<u>Propat Intern. Corp. v. Rpost, Inc.,</u> 473 F.3d 1187 (Fed. Cir. 2007).....	9
28	<u>Righthaven LLC v. Hoehn,</u> 716 F.3d 1166 (9th Cir. 2013)	9

1	<u>Rutter v. Carroll's Foods of the Midwest, Inc.,</u> 50 F. Supp. 2d 876 (N.D. Iowa 1999).....	15
2		
3	<u>TPZ Corp. v. Dabbs,</u> 25 A.D.3d 787 (N.Y.A.D. 2d Dept. 2006).....	14-15
4		
5	<u>STATUTES AND RULES</u>	
6	United States Code	
7	17 U.S.C. § 501.....	8, 9
8	35 U.S.C. § 281.....	8, 9
9	47 U.S.C. § 605.....	passim
10	47 U.S.C. § 553.....	passim
11	Federal Rules of Civil Procedure	
12	7.....	3
13	12.....	3-5
14	15.....	15
15	26.....	5
16	Miscellaneous	
17	17A C.J.S. <i>Contracts</i> § 375, t. 425 (1963).....	14
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

MEMORANDUM OF POINTS AND AUTHORITIES**INTRODUCTION AND STATEMENT OF FACTS**

Plaintiff was granted the exclusive nationwide commercial distribution rights to the *CONCACAF World Cup Qualifier Tournament, including but not limited to Peru v. Chile*, telecast nationwide on Tuesday, October 11, 2011 (hereinafter the “Program”). Complaint ¶ 16 (Dkt. No. 1). Plaintiff’s distribution rights encompassed all undercard events as well as the main event. Id. Pursuant to the contract granting Plaintiff its distribution rights, Plaintiff entered into sub-licensing agreements with various commercial establishments to permit the public exhibition of the Program. Id. at ¶ 17. Plaintiff alleges that, without its authorization, Defendants unlawfully intercepted and exhibited the Program at their commercial establishment in Irvine, California. Id. at ¶ 19. Defendants have now moved for judgment on the pleadings.

LEGAL STANDARD

The standard on a Motion for Judgment on the Pleadings under Federal Rule of Civil Procedure 12(c) is the same as the as the standard for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1192 (9th Cir. 1989). Rule 12(b)(6) examines the legal sufficiency of the facts alleged on the face of the plaintiff’s complaint. To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain factual allegations sufficient “to raise a right to relief above the speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In this regard, the Complaint must have “facial plausibility,” which exists “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Aschcroft v. Iqbal, 556 U.S. 662, 678 (2009). The burden of establishing that they are entitled to judgment on the pleadings is on Defendants. JMP Securities LLP v. Altair Nanotechnologies Inc., 2012 WL 892157, *7 (N.D.Cal. March 14, 2012).

ARGUMENT

1 I. A MOTION FOR JUDGMENT ON THE PLEADINGS TESTS THE
 2 PLEADINGS AND DEFENDANTS' MOTION IS DEPENDENT UPON
 3 INFORMATION OUTSIDE OF THE PLEADINGS.

4 Federal Rule of Civil Procedure 7 defines the "pleadings" in Federal Court. Pursuant to
 5 Rule 7:

6 (a) Pleadings. *Only these pleadings are allowed:* (1) a complaint; (2) an answer to
 7 a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an
 8 answer to a crossclaim; (5) a third-party complaint;(6) an answer to a third-party
 9 complaint; and (7) if the court orders one, a reply to an answer.

10 Fed.R.Civ.P. 7(a) (emphasis added). Under the Federal Rules a "pleading" is a term of art and
 11 comprise only those items listed in Federal Rule 7. Matranga v. Boyett Portable Restrooms,
 12 Inc., 2011 WL 7045237, *1 (S.D.Ala. Sept. 22, 2011); Gevara v. Hubbard, 2010 WL 1233839,
 13 *2 (M.D.N.C. March 23, 2010) ("Although the term 'pleading' is sometimes used loosely to
 14 refer to any filing in a court case, under the Federal Rules of Civil Procedure, 'pleading' is a
 15 term of art. Fed.R.Civ.P. 7(a)."') (citations / quotations in original).¹

16 Notwithstanding this, Defendants' Motion is based on information obtained from
 17 Plaintiff via Plaintiff's Federal Rule 26 Initial Disclosures. See Defendants' Motion, passim.²
 18 This information is not before the Court on a Motion for Judgment on the Pleadings, and the
 19 Court may not go beyond the pleadings when ruling on Defendants' Motion. See Hal Roach
 20 Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th Cir. 1989). In addition, this is
 21 not a case of Defendants simply referencing the wrong rule; to the contrary, Defendants
 22 acknowledge that they are *not* bringing their motion pursuant to Federal Rule of Civil Procedure
 23 12(b)(1). Specifically, Defendants state:

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 25
 26
 27 ¹ It is unclear from the Motion, which includes Defendants' repeated reliance on documents outside of the
 28 pleadings, whether Defendants are familiar with this definition.

28 ² These Initial Disclosures are submitted with the Declaration of defense counsel Matthew A. Pare. (Dkt. No. 14-1).

1 Although Federal Rule of Civil Procedure 12(b)(1) contemplates a mechanism by
 2 which a challenge to the subject matter jurisdiction can be raised, it is not the only
 3 vehicle. In particular, Federal Rule of Civil Procedure 12(h)(3) states that “[i]f the
 4 court determines *at any time* that it lacks subject-matter jurisdiction, the court
 5 must dismiss the action.” (Emphasis added.) Therefore, this issue can be raised at
 6 any time, and a motion for judgment on the pleadings is authorized by Federal
 7 Rule of Civil Procedure 12(c) which provides that “[a]fter the pleadings are
 8 closed—but early enough not to delay trial—a party may move for judgment on
 9 the pleadings.”

10 Defendants’ Motion at 6 (underline emphasis added). In other words, Defendants make clear
 11 that they are not challenging subject matter jurisdiction under Rule 12(b)(1) but, rather, via a
 12 Motion for Judgment on the Pleadings under Federal Rule 12(c). While Defendants are correct
 13 that they may raise a Federal Rule 12(c) Motion at this time, that does not mean Defendants
 14 may go outside the pleadings and present evidence.

15 A. A Facial Challenge To Standing Has Been Rejected.

16 Although Defendants do not even attempt to challenge the pleadings, even assuming
 17 *arguendo* they had, this argument has been rejected. In J & J Sports Productions, Inc. v.
Mendoza-Gowan, 2011 WL 1544886 (N.D.Cal. April 25, 2011), the Northern District addressed
 18 an affirmative defense of standing. The Court rejected the defense:

19 Defendant's third affirmative defense alleges that “plaintiff lacks legal standing
 20 (*contractual and statutory standing*) to pursue claims for alleged exhibition of the
 21 Program or bring this Complaint and the claims asserted therein against
 22 defendant” (Ans.2).

23 The complaint alleges that plaintiff has exclusive distribution rights to the
 24 program, but defendant unlawfully intercepted its transmission and displayed it
 25 without authorization. *Plaintiff has therefore adequately alleged standing.*

26 *Id.* at *3 (emphasis added); see also J & J Sports Productions, Inc. v. Montanez, 2010 WL
 27 5279907 (E.D.Cal. Dec. 13, 2010) (“Defendants' fifth affirmative defense states that Plaintiff is
 28 not a person protected by any of the *statutory violations* alleged in the Complaint. . . . Plaintiff
 alleges that it has the exclusive distribution rights to the Program and that Defendants
 unlawfully intercepted and/or displayed the transmission of the Program without authorization.

1 Plaintiff has adequately alleged its standing to pursue this lawsuit.”) (emphasis added) (internal
 2 quotation omitted); G & G Closed Circuit Events, LLC v. Nguyen, 2010 WL 3749284, *4
 3 (N.D.Cal. Sept. 23, 2010) (rejecting standing affirmative defense as legally insufficient).

4 B. Defendants Did Not Preserve The Issue Of Standing In The Pleadings.

5 While this Court may review subject matter jurisdiction at any time under Rule 12(b)(1),
 6 as noted above, Defendants make clear that they do not base their Motion on Rule 12(b)(1), but
 7 on Rule 12(c). Defendants’ Answer, filed on October 17, 2012, does not raise the defense of
 8 standing. See Answer (Dkt. No. 4). As such, there is no pleading on which Defendants can base
 9 their contention. Next, as a practical matter, Defendants’ Motion is based on what Defendants
 10 speculate must be produced in discovery. Specifically, on page 12 of their Motion, Defendants
 11 state:

12 One might ask the reasonable question as to how can defendants know that
 13 Innovative Sports Management, Inc. did not fulfill its duties under the license
 14 agreement. The answer is because no such documentation was produced by the
 15 plaintiff Innovative Sports Management, Inc. with its Rule 26 initial disclosures
 16 and there is an affirmative duty in federal litigation to make such a disclosure of
 17 supporting evidence, even absent a specific discovery request. Federal Rule of
 18 Civil Procedure 26(a)(1)(A).

19 Defendant’s Motion at 12. Defendants’ conclusion as to what they believe must be produced
 20 under Federal Rule 26 is only that, *Defendants’ conclusion*. Defendants offer no authority to
 21 support what they believe must be produced under Rule 26. See Id. Pursuant to Federal Rule 26,
 22 “a party must, without awaiting a discovery request, provide to other parties . . . all documents
 23 . . . that the disclosing party may use to support its claims or defenses, unless solely for
 24 impeachment.” Fed.R.Civ.P. 26(a)(1)(B). Even assuming a motion for judgment on the pleadings
 25 could be granted on Defendants’ inferences, there is no inference to be drawn from the alleged
 26 lack of “documentation.”

27 The burden on a Motion for Judgment on the Pleadings is on Defendants. As Defendants
 28 do not so much as challenge the pleadings, they do not satisfy their burden. For this reason

1 alone, Defendants' Motion should be denied. Nonetheless, without waiving the above
 2 arguments, Plaintiff will address the merits of Defendants' Motion below.

3 II. PLAINTIFF HAS CONSTITUTIONAL STANDING TO BRING ITS CLAIMS.

4 As an initial matter, Defendants are ambiguous as to the standing challenge they mount.
 5 After defining the elements of Constitutional standing, Defendants state, "the notion of standing
 6 can be further can be further limited as there are both Constitutional standing requirements as
 7 well as prudential standing requirements (judicially self-imposed), in addition to statutory
 8 standing requirements, and contractual standing requirements." Defendants' Motion at 6
 9 (citations omitted). Defendants then state, "[t]hese other limits on standing are primarily the
 10 basis (sic) upon which defendants bring their motion, as detailed *infra*." Id. (underline emphasis
 11 added). The use of the word "other" suggests Defendants do not challenge Constitutional
 12 standing; however, the use of the word "primarily" suggests that they may.

14 Ultimately, as Defendants do not return to the issue of Constitutional standing in their
 15 Motion, it appears they do not mount a Constitutional challenge. Nonetheless, Plaintiff will
 16 briefly address this issue. To establish Constitutional standing, the plaintiff must meet three
 17 elements:

19 First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally
 20 protected interest which is (a) concrete and particularized Second, there must
 21 be a causal connection between the injury and the conduct complained of-the
 22 injury has to be fairly traceable to the challenged action of the defendant
 Third, it must be likely, as opposed to merely speculative, that the injury will be
 redressed by a favorable decision.

23 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (internal quotations / citations
 24 omitted). Plaintiff satisfies all three factors of the Lujan analysis. First, Plaintiff's claims are
 25 concrete and particularized. Plaintiff's Complaint alleges the specific place at which Defendants
 26 committed the violations, the specific date on which the violations occurred, the specific
 27 Program unlawfully intercepted, that Defendants intercepted the Program with full knowledge

1 that they were unauthorized to do so, and that this was done for commercial advantage or
 2 financial gain. See Complaint, passim.

3 Next, “the issue in the causation inquiry is whether the alleged injury can be traced to the
 4 Defendants’ challenged conduct, rather than to that of some other actor not before the court.”
 5 Ecological Rights Foundation v. Pacific Lumber Co., 230 F.3d 1141, 1152 (9th Cir. 2000).
 6 Plaintiff alleges that the Program was broadcast at Defendants’ commercial establishment, and
 7 that Defendants did not obtain the Program from Plaintiff. See Complaint ¶¶ 17-19. The alleged
 8 injury can absolutely be traced to Defendants’ challenged conduct; there is certainly no “other
 9 actor not before the court.” The fact that the Program is alleged to have been displayed at
 10 Defendants’ commercial establishment, when coupled with the fact that Plaintiff was granted the
 11 exclusive commercial distribution rights, defeats any contention that the injury in fact is not
 12 “fairly traceable” to Defendants’ behavior. See Ecological Rights Foundation, 230 F.3d at 1152
 13 (9th Cir. 2000) (“The causal connection put forward for standing purposes cannot be too
 14 speculative, or rely on conjecture about the behavior of other parties, but need not be so airtight
 15 at this stage of the litigation as to demonstrate that the plaintiffs would succeed on the merits.”).

16 Part three of the Lujan test presumes a favorable decision and simply asks whether
 17 Plaintiff may be redressed. Because Plaintiff seeks monetary damages, it would be redressed by
 18 a favorable decision. See In re VeriSign, Inc., 2005 WL 88969, *5 (N.D.Cal. Jan. 13, 2005)
 19 (Plaintiffs sought damages to redress their injuries and that was sufficient for standing); Fralin &
 20 Waldron, Inc. v. Henrico County, Va., 474 F.Supp. 1315, 1321 (E.D.Va.1979).

21 III. DEFENDANTS’ OTHER STANDING ARGUMENTS FAIL AS THE
 22 EVIDENCE PRESENTED BY DEFENDANTS DOES NOT SUPPORT
 23 DEFENDANTS’ POSITION.³

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 27 _____
 28 ³ As noted in Section I, supra, Defendants misunderstand the nature of a Motion for Judgment on the Pleadings.
 Nonetheless, Plaintiff will address the merits of Defendants’ Motion.

1 Defendants refer generally to prudential, statutory and contractual standing requirements.
 2 Defendants' Motion at 6. Defendants, however, make no effort to specify what standing theory
 3 applies to what argument. It appears, however, that the argument in section I.B is a statutory
 4 standing argument (which is based on irrelevant statutes), and the argument in section I.D is a
 5 contractual standing argument.

6 A. Defendants' Exclusive Licensee Argument Ignores The Actual Statutes At
 7 Issue And Plaintiff Satisfies The Statutory Requirements Of 47 U.S.C. §§
 8 605 And 553.

9 Because they must for their arguments to have any relevance, Defendants conclude,
 10 without any legitimate basis or analysis, that this Court *must* follow Copyright Act and patent
 11 law cases and hold that Plaintiff does not have standing because it is not an exclusive licensee.
 12 In effect, Defendants contend that because Plaintiff does not satisfy the requirements for
 13 statutory standing *under the Copyright Act or under patent law*, it may not sue for a violation of
 14 47 U.S.C. §§ 605 or 553. Of course, such a contention is untenable.⁴

15 Defendants state, “[i]n television signal piracy cases and intellectual property matters at
 16 large, there is a body of law which explains how a licensee must be the ‘exclusive’ licensee in
 17 order to have standing to sue (see cases cited *infra*).” Defendants' Motion at 6 (underline
 18 emphasis added). What Defendants do not tell the Court is that the cases to which they cite
 19 address requirements under 17 U.S.C. § 501(b) or 35 U.S.C. § 281, and are *not* television piracy
 20 cases. If there is a “*body*” of television signal piracy case law that hold what Defendants claim,
 21 it is astounding that Defendants do not cite to one such case.

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 26 ⁴Defendants’ “argument” makes no attempt to analyze or apply the cases they cite to the facts. Defendants present a
 27 quick synopsis of seven cases and then a narrative of the facts of this case. At no time do Defendants attempt to
 28 connect the holding of any particular case to the facts herein. This Court is not obligated to extrapolate a connection
 for them. See Indep. Towers of Wash. v. Washington, 350 F.3d 925, 929-30 (9th Cir. 2003) (the court cannot
 manufacture arguments for a party; only issues that are “argued specifically and distinctly” are considered.”).

1 Defendants cite to seven cases in Subsection II.B of their Argument. See Defendants'
 2 Motion at 7-8. Four of the seven cases relied upon by Defendant are Copyright Act cases. See
 3 Defendants' Memorandum at 7, citing Nafal v. Carter, 540 F.Supp.2d 1128 (C.D.Cal. 2007);
 4 Althin CD Medical, Inc. v. West Suburban Kidney Center, S.C., 874 F.Supp. 837 (N.D.Ill.
 5 1994); HyperQuest, Inc. v. N'Site Solutions, Inc., 632 F.3d 377 (7th Cir. 2011); Righthaven
 6 LLC v. Hoehn, 716 F.3d 1166, 1169 (9th Cir. 2013). All of these cases involved an
 7 interpretation of Copyright statutes and a determination of whether there was statutory standing
 8 under 17 U.S.C. § 501(b) or its predecessor. Nafal, 540 F.Supp.2d at 1137-38; Althin CD
 9 Medical, Inc., 874 F.Supp. at 842; HyperQuest, Inc., 632 F.3d at 381; Righthaven, LLC, 716
 10 F.3d at 1169.

12 The other three cases cited by Defendants, AsymmetRx, Inc. v. Biocare Medical, LLC,
 13 582 F.3d 1314 (Fed. Cir. 2009), Propat Intern. Corp. v. Rpost, Inc., 473 F.3d 1187 (Fed. Cir.
 14 2007), and Pfizer, Inc. v. Elan Pharmaceutical Research Corp., 812 F.Supp. 1352 (D.Del. 1993)
 15 were patent infringement cases. These cases involved a determination of whether there was
 16 statutory standing under 35 U.S.C. § 281. AsymmetRx, Inc., 582 F.3d at 1318; Propat Intern.
 17 Corp., 473 F.3d at 1189; Pfizer, Inc., 812 F.Supp. at 1370.

19 In Righthaven⁵, the Ninth Circuit held, “[u]nder the Copyright Act, only the “legal or
 20 beneficial owner of an exclusive right under a copyright” has standing to sue for infringement
 21 of that right. *See* 17 U.S.C. § 501(b)[.]” Id. at 1169 (citation in original, further citation
 22 omitted). Specifically, 17 U.S.C. § 501(b) provides:

24 The legal or beneficial owner of an *exclusive right* under a copyright is entitled,
 25 subject to the requirements of section 411, to institute an action for any
 infringement of that particular right committed while he or she is the owner of it.
 26 17 U.S.C. § 501(b) (emphasis added).

27
 28 ⁵ While Righthaven LLC is the last case cited by Defendants, it is the most recent case decided (May 9, 2013).

1 To the contrary, 47 U.S.C. 605 provides that, “[*a*]ny person aggrieved...may bring a
 2 civil action in a United States district court or in any other court of competent jurisdiction.” 47
 3 U.S.C. § 605(e)(3)(A) (emphasis added). Similarly, 47 U.S.C. § 553 provides that, “[*a*]ny
 4 person aggrieved by any violation of subsection (a)(1) of this section may bring a civil action in
 5 a United States district court or in any other court of competent jurisdiction.” 47 U.S.C. §
 6 553(c)(1) (emphasis added). Section 605 further clarifies that, “the term ‘any person aggrieved’
 7 shall *include* any person with proprietary rights in the intercepted communication by wire or
 8 radio[.]” 47 U.S.C. § 605(d)(6) (emphasis added).⁶ As a practical matter, it has routinely been
 9 held that parties akin to Plaintiff is an “aggrieved party” under the piracy statutes. E.g. J & J
 10 Sports Productions, Inc. v. Delgado, 2012 WL 371630, *3 (E.D.Cal. Feb. 3, 2012); Directv v.
 11 Budden, 420 F.3d 521, 525-28 (5th Cir. 2005) (discussing broad and “enlarged” scope of
 12 aggrieved party under 47 U.S.C. § 605); J & J Sports Productions, Inc. v. Rezdndiz, 2008 WL
 13 5211288, *2 (N.D.Ill. Dec. 9, 2008) (finding plaintiff to be an aggrieved party under 47 U.S.C.
 14 § 553); Joe Hand Promotions, Inc. v. Caddyshanks, LLC, 2013 WL 869527, *3 (M.D.Fla.
 15 March 7, 2013) (47 U.S.C. § 553 confers standing on any person who is aggrieved because of
 16 the unauthorized interception).

17 In J & J Sports Productions, Inc. v. Mandell Family Ventures, LLC, 2012 WL 4757694
 18 (N.D.Tex. Oct. 5, 2012), the district court succinctly summarized that a commercial licensor of
 19 sports programming like Plaintiff has statutory standing:

20 Since J & J Sports was the exclusive licensee of the distribution rights to the
 21 Event, J & J Sports is an “aggrieved person” under the statute and can bring a
 22 private right of action for either actual damages or statutory damages for each
 23 violation. *See* 47 U.S.C. §§ 553(c)(1) & (3)(A); 605(d)(6) & (e)(3)(C)(I)[.]

24
 25 Id. at *3 (citations in original).

26
 27 ⁶ Section 553 does not define “aggrieved party”; however, in light of the significant overlap between sections 553
 28 and 605, the definition from section 605 is instructive

1 In interpreting a statute, “the first step is to determine whether the language at issue has
 2 a plain and unambiguous meaning with regard to the particular dispute in the case.” Barnhart v.
 3 Sigmon Coal Co., 534 U.S. 438, 450 (2002) (internal quotations omitted). If the language is
 4 unambiguous, the inquiry ceases. Id. Here, the unambiguous language in both 47 U.S.C. § 605
 5 and 47 U.S.C. § 553 makes clear that Plaintiff has statutory standing. Ultimately, Defendants
 6 would have this Court ignore the language of 47 U.S.C. §§ 605 and 553 in favor of case law
 7 interpreting copyright and patent law. Of course, Defendants offer no authority for such a
 8 proposition.
 9

10 Defendants “anticipate” that Plaintiff will distinguish the cases to which they cite, and in
 11 an effort to head this off, argue that courts have borrowed Copyright Act analysis in addressing
 12 other issues. See Defendants’ Motion at 10. The fact that Defendants acknowledge this in
 13 advance does not make their arguments any more sound. More importantly, the simple fact that
 14 certain courts have analogized the piracy act statutes to the Copyright Act in certain contexts
 15 does not make such an approach valid when the express language of 47 U.S.C. §§ 605 and 553
 16 and case law directly addressing standing thereunder contradicts Defendants’ basic premise.
 17

18 For example, Defendants note that certain courts have applied the Copyright Act statute
 19 of limitations to claims under 47 U.S.C. §§ 605 and 553. See Defendants’ Motion at 10
 20 (citations omitted). While this is correct, other Courts, including the Ninth Circuit in DirecTV v.
 21 Webb, 545 F.3d 837 (2007), have not. The simple explanation for this is that neither 47 U.S.C.
 22 §§ 605 or 553 contain a statute of limitations, see Webb at 847, and thus it is necessary to do
 23 such an analysis. To the contrary, 47 U.S.C. §§ 605 and 553 establish the requirements of
 24 statutory standing.
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 26 ///
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1 1. Plaintiff Was Granted the Right to Pursue Claims for Piracy.⁷

2 Setting the above aside, Plaintiff was granted the exclusive rights it seeks to enforce. As
 3 noted in the Event Distribution Agreement, Plaintiff (“Distributor” under the Event Distribution
 4 Agreement”) was tasked with “tak[ing] appropriate measures to prevent misappropriation or
 5 unauthorized use of the event and all rights associated therewith[.]” Event Distribution
 6 Agreement at 3.⁸ While Plaintiff submits that this paragraph is clear on its face and
 7 unequivocally establishes that it is Plaintiff (i.e., Distributor) that is responsible for addressing
 8 piracy, Plaintiff will nonetheless refute Defendants’ narrow reading of the provision. Because
 9 they must for their arguments to have any validity, Defendants focus on the word “prevent” and
 10 construe this provision to mean that Plaintiff only has the authority to take action *prior* to an act
 11 of piracy. See Defendants’ Motion at 10. Specifically, Defendants state, “[i]n other words, the
 12 licensee was to help prevent misappropriation, not try to sue people after an alleged
 13 misappropriation.” Id. (emphasis added).

14 There are two major deficiencies with this argument. First, it flouts the plain language of
 15 the contract. Plaintiff was tasked with taking “appropriate measures to prevent misappropriation
 16 or unauthorized use.” Event Distribution Agreement at 2. There are no restrictions on the *types*
 17 of measures Plaintiff may take. Certainly, Defendants (and in particular defense counsel, who
 18 routinely holds himself out as an expert in piracy litigation), will not argue that the filing of
 19 lawsuits is not a preventative measure against future piracy. Indeed, one of the stated purposes
 20 of the damages provisions of the piracy statutes is deterrence against future piracy. See J & J
 21 Sports Productions, Inc. v. Marcaida, 2011 WL 2149923, *4 (N.D.Cal. May 31, 2011) (“[T]he
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23 25
 24 26 7 While Plaintiff acknowledges that there has been some inconsistency in the names by which Plaintiff has identified
 25 itself, the *corporate* name is Innovative Sports Management, Inc., and the company does business as Integrated
 26 Sports Media. Jacobs Declaration ¶ 4. Innovative Sports Management, Inc., Plaintiff herein, entered into the Event
 27 Distribution Agreement at issue. Id. ¶ 5.

28 28 8 A copy of this Agreement is attached to the Declaration of Matthew A. Pare at pages 16-20.

1 Court notes that signal piracy is a pervasive and increasing problem and that a primary purpose
 2 of § 605 is to deter such conduct. . . .”). This sends a signal to potential pirates that they will be
 3 prosecuted. Under Defendants’ rationale, if Plaintiff does not stop piracy *in advance* it has no
 4 recourse. There is nothing in the Event Distribution Agreement to support such a construction.

5 Next, at best, Defendants have established that there is an ambiguity in the contract with
 6 respect to who may pursue claims for piracy. Contrary to Defendants’ unequivocal statement
 7 that “Al Jazeera Media Network did not relinquish its rights to pursue litigation and control that
 8 litigation,” Defendants’ Motion at 10, there is nothing in the Event Distribution Agreement that
 9 says this. Nonetheless, Plaintiff has submitted the Declaration of Doug Jacobs, President of
 10 Innovative Sports Management, Inc., which clarifies that Plaintiff and Plaintiff *alone* was
 11 authorized and obligated to pursue claims of piracy. Jacobs Declaration ¶ 7.

12 Defendants also make reference to an “extremely significant” other provision of the
 13 Event Distribution Agreement that flatly misreads the provision. See Defendants’ Motion at 10,
 14 quoting Event Distribution Agreement at 3. The provision in question states:

15 Distributor hereby recognizes and agrees that all copyrights, trademarks, trade
 16 names and other rights associated with the Event and the Event itself
 17 (collectively, the “Property”) are and shall remain the sole and exclusive property
 18 of SF, and Distributor shall not have any *right to use the Property except as*
 19 *herein agreed.*

20 Event Distribution Agreement at 3 (emphasis added). While it is true that Al Jazeera Media
 21 Network (hereinafter “Al Jazeera”) retained copyrights, etc. for uses *other* than those addressed
 22 in the Event Distribution Agreement (i.e., the rights conferred on Plaintiff), that is irrelevant to
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1 this cause of action. This cause of action involves rights that were conferred on Plaintiff.⁹

2 IV. DEFENDANTS HAVE NO RIGHT TO CHALLENGE THE CONTRACT.

3 In effect, the arguments Defendants raise are tantamount to those that may be raised by a
 4 third-party beneficiary to a contract. Defendants, however, are not in such a position and have no
 5 standing to challenge the contract. In re Porter's Estate, 142 N.Y.S. 2d 787, 789 (N.Y. Sur. 1955)
 6 (“Before such beneficiaries have a right to enforce the original contract it most clearly appears
 7 that the contract was made and intended for their benefit.”). There was no intent by the parties to
 8 the contract to benefit any third party. While this is clear from the language of the Event
 9 Distribution Agreement itself, to the extent there is any ambiguity, this is also confirmed by Mr.
 10 Jacobs. Jacobs Declaration ¶ 6.

11 Next, as a practical matter, even if Defendants were third-party beneficiaries, a third-
 12 party beneficiary who seeks to enforce a contract does so subject to the defenses that would be
 13 valid as between the parties. See Hanrihan v. Parker, 19 Misc.2d 467, 469 (N.Y.Sup. 1959) (“a
 14 suit in contract by an alleged third-party beneficiary is subject to the same defenses as a suit by a
 15 contracting party.”); Gennett v. Smith, 244 A.D.3d, 5 (N.Y.A.D. 3d Dept. 1935) (“the third party
 16 cannot acquire a better right against the promisor than the promisee himself had.”); cf. TPZ
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 19
 20 ⁹ Defendants also note the requirement that written notification be made to Al Jazeera. Defendants' Motion at 10;
 21 Event Distribution Agreement at 2. As evidenced by the agreement itself, there is no specific method by which this
 22 must be accomplished, nor is there any time frame (other than that notification should be prompt). See Id. As a
 23 practical matter, even if the arguments Defendants present were valid on their face, they are academic as the parties
 24 to the contract (i.e., Integrated Sports Management, Inc. and Al Jazeera Media Network) have manifested an
 25 intention to waive compliance with the requirement of written notification. Parties to a contract may waive a
 26 provision in the contract if evidence demonstrates that was the parties' intent; this may be demonstrated by the
 27 parties' course of conduct. See TPZ Corp. v. Dabbs, 25 A.D.3d 787, 791 (N.Y.A.D. 2d Dept. 2006); see 17A C.J.S.
 Contracts § 375, t. 425 (1963) (“While one party to a contract cannot alter its terms without the assent of the other
 parties, the fact of agreement may be implied from a course of conduct in accordance with its existence.”). [The
 Event Distribution Agreement is governed by the laws of New York. Event Distribution Agreement at 5.] Plaintiff
 has submitted the Declaration of Doug Jacobs, President of Innovative Sports Management, Inc., who testifies that
 “a custom developed between Innovative Sports Management, Inc. and Al Jazeera whereby it was intended,
 understood, and agreed that strict compliance via written notification of piracy would not be necessary.” Jacobs
Declaration ¶ 8. Al Jazeera has never objected to this course of conduct and, Innovative Sports Management, Inc.
 has relied upon this course of conduct. Id. ¶ 9.

1 Dabbs, 25 A.D.3d at 792-93 (“It is elementary ancient law that an assignee never stands in any
 2 better position than his assignor”). In that regard, for Defendants’ argument to succeed, they
 3 would need to establish that Al-Jazeera agrees with them. Setting aside whether this is plausible,
 4 there is certainly no evidence to support such a conclusion.

5 Defendants contend that this Court may consider their argument. Defendants’ Motion at
 6 11. In support of this, however, Defendants cite to three cases, two of which, as they note, were
 7 cited in J & J Sports Productions, Inc. v. Kurz, Ltd., 2009 WL 1886124, *10 (E.D.Pa. June 30,
 8 2009). Id. (citations omitted). Two pages later, Defendants state that Kurz is distinguishable and
 9 that this is an issue of first impression in this Court. See Id. at 13-14.¹⁰ Defendants cannot have it
 10 both ways.

11 Finally, notwithstanding all of the above, even if the Defendants could enforce the
 12 clauses on which they purport to rely, this is not a jurisdictional defect, and therefore, it can be
 13 cured. Cf. Rutter v. Carroll's Foods of the Midwest, Inc., 50 F. Supp. 2d 876, 882-883 (N.D.
 14 Iowa 1999) (superseded by statute) (Finding a “mediation release is a ‘condition precedent’ to
 15 suit, not a jurisdictional prerequisite. As such, the defect of failing to obtain such a release does
 16 not affect the claimant’s standing or the subject matter jurisdiction of the court, but is instead
 17 curable after suit has been filed.”).

18 V. PLAINTIFF SHOULD BE GRANTED LEAVE TO AMEND ITS COMPLAINT.

19 If this Court is inclined to grant Defendants’ Motion, this Court should grant Plaintiff
 20 leave to amend its Complaint to cure any deficiencies therein. Pursuant to Federal Rule of Civil
 21 Procedure 15(a), leave to amend a complaint should be freely given “when justice so requires.”
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 26 ¹⁰ Defendants’ argument that Kurz (as well as another Eastern District of Pennsylvania case, J & J Sports
 27 Productions, Inc. v. Baylor, Case No. 5:13-cv-02483-JS (E.D.Pa. July 25, 2013, Dkt. No. 16)), are distinguishable is
 28 ultimately dependent on Defendants’ misunderstanding of what a “pleading” is. See Defendants’ Motion at 13.
 Finally, Plaintiff notes that in both cases a similar motion was denied. See Kurz, 2009 WL 1886124 at *10-11;
Baylor at *2.

1 Fed.R.Civ.P. 15(a); See Foman v. Davis, 371 U.S. 178, 182 (1962). The Court may grant leave
2 to amend if it grants a Motion for Judgment on the Pleadings. Alatorre v. Wastequip Mfg. Co.
3 LLC, 2013 WL 796717, *2 (E.D.Cal. March 4, 2013) (“Although Rule 12(c) does not mention
4 leave to amend, courts have the discretion in appropriate cases to grant a Rule 12(c) motion with
5 leave to amend[.]”)

6 Defendants contend that this case presents an issue of “first impression.” Defendants’
7 Motion at 14. Given the novelty of the issue, Plaintiff should be afforded the opportunity to
8 conform its pleadings to any additional requirements. Finally, there have been no prior
9 amendments herein.

11 **CONCLUSION**

12 Defendants’ Motion is procedurally deficient as it relies on matters outside the pleadings.
13 Moreover, Defendants’ substantive arguments fail as Defendants rely upon inapposite case law
14 and have no right to challenge the contract between Plaintiff and Al Jazeera. Finally, even if
15 Defendants’ arguments were otherwise valid, there has been no breach of the parties’ contract.
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18 WHEREFORE, for the reasons set forth herein, Plaintiff respectfully requests that
19 Defendants’ Motion for Judgment on the Pleadings be denied or, in the alternative, if this Court
20 grants Defendants’ Motion that Plaintiff be granted leave to amend, and that Plaintiff be awarded
21 such other relief as may be just and proper.

22 Respectfully submitted,
23

24 Dated: September 10, 2013
25

/s/ Thomas P. Riley
LAW OFFICES OF THOMAS P. RILEY, P.C.
By: Thomas P. Riley
Attorneys for Plaintiff
Innovative Sports Management, Inc.

PROOF OF SERVICE

I declare that:

I am employed in the County of Los Angeles, California. I am over the age of eighteen years and not a party to the within cause; my business address is First Library Square, 1114 Fremont Avenue, South Pasadena, California 91030. I am readily familiar with this law firm's practice for collection and processing of correspondence/documents for mail in the ordinary course of business.

On September 10, 2013, I caused to serve the following documents entitled:

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT
ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES**

On all parties referenced by enclosing a true copy thereof in a sealed envelope with postage prepaid and following ordinary business practices, said envelope was addressed to:

Matthew A. Pare, Esq.
LAW OFFICE OF MATTHEW PARE
303 H Street, Suite 435
Chula Vista, CA 91910

The fully sealed envelope with pre-paid postage was thereafter placed in our law firm's outbound mail receptacle in order that this particular piece of mail could be taken to the United States Post Office in South Pasadena, California later this day by myself (or by another administrative assistant duly employed by our law firm).

I declare under the penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct and that this declaration was executed on September 10, 2013, at South Pasadena, California.

Dated: September 10, 2013

/s/ *Vanessa Morales*
VANESSA MORALES